No. 77-802

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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NORTHWEST AIRLINES, INC.,

*Petitioner,*

v.

MARY P. LAFFEY, *et al.*,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Northwest Airlines, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 20, 1976.

## OPINIONS BELOW

The opinions and order of the district court, *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C.

1973), and *Laffey v. Northwest Airlines, Inc.*, 374 F. Supp. 1382 (D.D.C. 1974), and the opinion of the court of appeals, which is not yet reported, are reprinted in a separate Appendix to this Petition (Pet. App. A, B, and C, respectively). By order entered on September 8, 1977 (Pet. App. E), the court of appeals amended its October 20, 1976 opinion in several respects.

## JURISDICTION

The judgment of the court of appeals (Pet. App. D) affirming in part and vacating in part the judgment of the district court was entered on October 20, 1976. A timely petition for rehearing was denied on September 8, 1977 (Pet. App. F). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether the existence of a *bona fide* collective bargaining agreement treating two jobs as different and establishing wage differentials between them precludes a finding that the jobs are equal and that the employer has "discriminate[d] . . . on the basis of sex" within the meaning of the Equal Pay Act.

2. Whether one job can be found to require "equal skill, effort, and responsibility" with another job within the meaning of the Equal Pay Act where the first position is defined as a supervisory job and employees



in that position exercise supervisory responsibility over employees in the other.

3. Whether a violation of the Equal Pay Act is "willful," thereby extending the period of backpay recovery, solely because an employer has acted consciously in maintaining job classifications, but has done so with a reasonable, good faith belief that his actions are entirely lawful.

4. Whether, as the court below held, the industry-wide existence of an employment practice and the approval of the practice in a collective bargaining agreement are irrelevant as a matter of law to a finding that the employer had acted in "good faith," thereby justifying the court's exercise of statutory discretion under the Equal Pay Act not to assess double damages.

5. Whether cases pending in court at the time of the 1972 amendments to Title VII of the Civil Rights Act of 1964 are governed by the amendment limiting backpay awards to two years prior to the filing of charges with the Equal Employment Opportunity Commission.

6. Whether the courts may make an "equitable modification" to the statutory "jurisdictional prerequisite" prohibiting an employee from bringing a judicial action unless the employee filed charges with the Equal Employment Opportunity Commission within 90 days after the allegedly discriminatory practice.

## STATUTORY PROVISIONS INVOLVED

Set forth in an appendix at the end of this Petition are the pertinent provisions of the statutes involved: the Equal Pay Act of 1963, 29 U.S.C. §206(d), the Fair Labor Standards Act, 29 U.S.C. §§216(b), 251(a), 255(a), 260, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*

## STATEMENT

### 1. Introduction

This case involves one of the largest judgments—and perhaps *the* largest—ever rendered under the Equal Pay Act or Title VII of the Civil Rights Act because of alleged sex discrimination. Under the decision below, petitioner Northwest Airlines, Inc. must retroactively pay *all* female cabin attendants at the higher rate previously established by collective bargaining agreement for less than five percent of its cabin attendants. Under the liability standards fashioned by the courts below, Northwest faces a backpay award that ultimately may reach $50 million.

Northwest has employed two types of cabin attendants in its airline passenger operations. One class consists of female "stewardesses" and male "flight service attendants" ("FSA's"), now called "stewards." The other class, higher-rated and generally higher paid, consists of "pursers." Despite a history of nearly thirty years during which Northwest, its employees, and their female-dominated union all have manifested the understanding that the purser position is different from and superior to that of other cabin attendants, respondent stewardesses brought this action under the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, claiming job discrimination because stewardesses (as well as male FSA's) were paid less than pursers and because, until the late 1960's, only men were eligible to be pursers.



Northwest does not contest the holding that the pre-1970 obstacles to promotion of women to the position of purser violated Title VII. What Northwest does contest are the legal standards applied in determining that the positions of purser and stewardess are substantially identical and that the payment of pursers at a rate greater than that paid stewardesses therefore constituted discrimination "on the basis of sex" in violation of the Equal Pay Act. Northwest also challenges the holdings under which double damages may be assessed and the backpay period extended from two to three years.

### 2. Northwest's Aircraft Cabin Attendants

Northwest first began passenger operations in 1927 with female cabin attendants called "stewardesses." In 1947, when Northwest commenced international operations, it began to employ "pursers" who, in accordance with maritime tradition, were to exercise overall supervisory responsibility for passenger comfort and well-being. Because purser duties involved cargo handling and the procurement and loading of foodstuffs,

Northwest, like other airlines, followed the maritime tradition and limited its purser complement to men. The remainder of Northwest's cabin attendants included both men and women.[1] Beginning in 1949 and continuing with minor interruption until the present, Northwest has employed a limited number of male FSA's (or stewards) who by practice and by specification in collective bargaining agreements were generally to perform the same functions as stewardesses.

Since 1948 all cabin attendants (pursers, stewardesses, and FSA's) have been represented by a single labor union. Reflecting the preponderance of women cabin attendants, both union membership and union leadership always have been overwhelmingly female, with women often outnumbering men by a ratio of over fifteen to one. Indeed, several of the named plaintiffs in this action have been among the leaders of the cabin attendants' union.

Collective bargaining agreements negotiated between Northwest and the female-dominated union since the 1940's have contained distinct definitions of the responsibilities of stewardesses and pursers.[2] Although the negotiated job definitions of pursers and stewardesses reflect an overlap in duties, comparison of these definitions reveals that purers have duties and responsibilities – notably supervisory – that are theirs

[1] For a more complete description of the reasons why the purser position was confined to men, see 366 F. Supp. at 772-773, Pet. App. 20a-21a, ¶37.

[2] 366 F. Supp. at 766, Pet. App. 6a-7a, ¶¶10-11. Effective with the 1951 collective bargaining agreement, FSA's were included in the "stewardess" definition.



alone.[3] The following features are unique to the description of the purser's job:

> " 'Flight Purser' means an employee *on the international division* whose work includes . . . responsibility for the preparation and completion of passenger, crew, and cargo manifests and other reports and documents as may be required by the Company or by law. A flight purser may be designated to perform necessary duties *in connection with flight cargo operations*, may be designated as being *in charge of other cabin attendants*, may be required to accept special assignments related to flight purser duties, and from time to time may be requested to participate in publicity and promotional assignments not in violation of any of the terms of this Agreement." 366 F. Supp. at 766, Pet. App. 6a-7a, ¶11 (emphasis added).

In 1964, one year after the enactment of the Equal Pay Act, the purser definition was reviewed at the union's behest. In the words of the union negotiators presenting the pact to the membership for ratification, the negotiated result was designed to provide "a more accurate description of a flight purser's duties and responsibilities" (Def. Ex. 248). The definition carried forward the unique reference to pursers' supervisory duties, as well as to their concentration on international flights and their participation in all-cargo operations.[4]

[3] Some of the key differences are discussed – but discounted – in the opinion of the court of appeals (Pet. App. 9c-16c).

[4] Significantly, until the filing of this action, every stewardess effort in the name of equal employment opportunity had been directed toward increasing stewardess access to the purser rolls, rather than toward abolishing the purser position or the pay differential. Of all the grievances filed during the course of union

*(continued)*

Northwest's cabin service manual, which prescribes all aspects of cabin service, describes a chain of command in which a purser, regardless of seniority, is at all times the cabin attendant in charge of overall cabin service whenever the flight carries a purser. Operating from the first class section of the aircraft, the purser exercises supervisory authority over all other cabin attendants, male or female, whether located in first class or tourist. Pursers are ultimately responsible for all aspects of cabin service in aircraft that may hold hundreds of passengers.[5]

In contrast, on those flights, primarily domestic, for which pursers are unavailable or to which they are not assigned, the cabin attendant with the most seniority assumes responsibility for the coordination of all cabin service on that flight. Because flight schedules are chosen by stewardesses in accordance with their preferences on the basis of seniority, the cabin crew on any particular flight is likely to consist of cabin

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*(footnote continued from preceding page)*
representation, not one was directed at the pay differential between pursers and stewardesses. Instead, in 1967 the collective bargaining agreement was amended to permit stewardesses to bid for purser vacancies as they arose.

[5] Pursers receive special training during which their supervisory responsibilities are emphasized. As part of their supervisory duties, for example, pursers make periodic inspections throughout an aircraft in order to insure that cabin service is maintained at the proper level. Pursers also may assign other crew members to their duty stations, and pursers are reponsible for giving safety briefings to other crew members before overwater and other flights.

A stewardess or FSA serving as cabin attendant in tourist has more limited supervisory duties over only the other cabin attendants working there. *See* Pet. App. 14c-15c.



attendants with approximately equal lengths of service. Thus, while an individual stewardess may assume some supervisory responsibilies on a particular flight, those occasions are random and sporadic. In short, all pursers have formal, inherent supervisory authority, whereas only some stewardesses perform some supervisory duties on intermittent occasions.

### 3. The Decisions Below

Northwest acknowledged below that the custom of restricting purser positions to men prior to the 1967 amendments to the collective bargaining contract, although understandable from an historical perspective, was inconsistent with Title VII. But the stewardess class argued successfully, if somewhat inconsistently, that the job to which they were ineligible for promotion was in fact "equal" to the one they held, so that the payment of higher compensation to pursers for "equal" work constituted discrimination on the basis of sex in violation of the Equal Pay Act and the cognate provisions of Title VII. The district court, while conceding the "reasonableness" of the historic differentiation, concluded that the purser and stewardess jobs were equal. As a result, the vast majority of cabin attendants – other than male FSA's – were declared entitled to the higher pay that had been regularly negotiated as appropriate only for the relatively small number of pursers.

The district court found the Equal Pay Act violation "willful," thus establishing the back-pay period as three years rather than two, *see* 29 U.S.C. §255(a), but

simultaneously held that Northwest had acted in "good faith," so that statutory double damages were not warranted. *See* 29 U.S.C. §§216(b), 260. The court also found that the proper backpay period under Title VII was two years prior to the filing of charges with the EEOC. Cross-appeals followed.

The court of appeals affirmed the basic holding of liability, concluding that the district court's "factual" finding of job equality was not "clearly erroneous." The court discounted the significance of the pursers' supervisory responsibilities by reasoning that the supervisory functions were "less important than, and require no greater skill, effort, or responsibility, than *the other functions* assigned to all cabin attendants" (Pet. App. 37c-38c; emphasis added).

In addition, at each opportunity the court adopted standards and tests that would have the effect of inflating backpay awards and imposing the highest conceivable liability. Notwithstanding the established meaning of "willful" as a term of art requiring an intentional violation of a known legal duty, the court below decided that the Equal Pay Act must be "liberally construed" (Pet. App. 57c) and held that an "employer's noncompliance [with the Act] is 'willfull' when he is cognizant of an appreciable possibility that he may be subject to the statutory requirement" or "consciously and voluntarily charts a course which turns out to be wrong" (Pet. App. 58c-59c). The court of appeals thus affirmed the award of three years' backpay, rather than two, under 29 U.S.C. §255(a) (Pet. App. 60c-62c).

The court then overturned the district court's exercise of discretion in refusing to award double



damages, rejecting the lower court's finding that Northwest had acted in "good faith." The district court had found that:

> "[Northwest] did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. Five factors support this conclusion: the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present controversy, and the absence of any clear legal precedent or guideline precisely in point." 374 F. Supp. at 1390, Pet. App. 1b-2b.

But, in a ruling that effectively mandates the award of double damages for every successful Equal Pay Act claim, the court of appeals held that the factors cited by the district court were legally insufficient to support its finding of petitioner's good faith. The court mandated a new test: "legal uncertainty . . . must pervade and markedly influence the employer's belief; merely that the law is uncertain does not suffice" (Pet. App. 68c).

With regard to the backpay period under Title VII, the court of appeals held that the 1972 amendment to Title VII, 42 U.S.C. §2000e-5(g), which limits backpay liability to the two-year period prior to the filing of charges with the EEOC, does not apply to the instant case, because the complaint was filed in court before the amendment was enacted. Although the two-year limitation had been added to Title VII to avoid

imposition of "an horrendous potential liability," 117 Cong. Rec. 31973 (1971), the court held that the district court was forbidden even to draw upon the policy reflected in the 1972 amendment in exercising its residual discretion to determine the appropriate backpay period.

Finally, the court of appeals held that the statutory prerequisites for filing Title VII actions, 42 U.S.C. §2000e-5(d), are not jurisdictional and ruled that Northwest was estopped from asserting that the Title VII class could not include those stewardesses whose employment with Northwest had terminated more than 90 days prior to the filing of charges with the EEOC. While conceding that this Court and other courts of appeals have "referred" to the EEOC filing requirement as "jurisdictional," the court below declined to treat the requirement as jurisdictional and instead held that "the time provisions of Title VII are subject to equitable modification" (Pet. App. 86c-89c).

## REASONS FOR GRANTING THE WRIT

In 1947 Congress declared that the Fair Labor Standards Act had been "interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation . . ." Congress concluded that these interpretations, if not changed by legislation, would "seriously impair the capital resources" of many employers, would permit employees to receive "windfall payments" beyond the rewards



"included in their agreed rates of pay," and would impair "voluntary collective bargaining." 29 U.S.C. §251(a) (Congressional findings and declaration of policy).

The very consequences Congress sought to avoid by enacting amendatory legislation (including provisions at issue in this litigation) are produced by the decision below. The court below concluded that two different positions – pursers and stewardesses – that have been recognized in collective bargaining agreements dating back more than 20 years as distinct positions having different responsibilities are nevertheless "equal" and thus require identical pay. The result is that Northwest must retroactively pay its stewardesses, who have outnumbered the higher-paid pursers by more than twenty to one, a windfall that may aggregate as much as $50 million – a bonus never contemplated by either side at the time the collective bargaining agreements were made or the employees' work performed.[6]

### I

This case presents a critical, unresolved issue under the Equal Pay Act: whether that Act can apply to job differentials established without discriminatory intent

[6] At least two other consolidated class actions against another airline raising virtually identical issues under Title VII and the Equal Pay Act are awaiting decision in the Southern District of New York. *See generally Maguire v. Trans World Airlines, Inc.*, 403 F. Supp. 734 (S.D.N.Y. 1975); *id.*, 55 F.R.D. 48 (S.D.N.Y. 1972); *De Figueiredo v. Trans World Airlines, Inc.*, 55 F.R.D. 44 (S.D.N.Y. 1971); *id.*, 322 F. Supp. 1384 (S.D.N.Y. 1971).

and in accordance with a *bona fide* collective bargaining agreement treating the jobs as different.

The Equal Pay Act of 1963, 29 U.S.C. §206(d)(1), prohibits an employer from discriminating *on the basis of sex* by paying men and women different wages for the same work. As defined in the Act, one job is "equal" to another only when it "requires equal skill, effort, and responsibility" and is "performed under similar working conditions." The Act does not forbid paying men and women different wages for different jobs; nor does it prevent wage differentials for what may be the same work where those differentials are based on a consideration other than sex, such as a *bona fide* job evaluation plan indicating the jobs are different. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195-205 (1974); *Cayce v. Adams*, ____ F. Supp. ____ (C.A. No. 77-0049) (D.D.C. Oct. 21, 1977) (slip op. at 2 n.1, 4-5) (Gesell, J.); *cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976) ("it is a finding of *sex-based* discrimination that must trigger . . . the finding of an unlawful employment practice under [Title VII of the Civil Rights Act of 1964]") (emphasis added).

The issue presented by this case is whether a *bona fide* collective bargaining agreement defining and treating two jobs differently is tantamount to a *bona fide* job evaluation plan and, thus, under the principles established in *Corning Glass*, precludes a finding that there was a violation of the Equal Pay Act. In short, can a court, despite a *bona fide* contractual understanding that two jobs are different, determine that the payment of different wages is "discrimination based on sex," solely because the court concludes that the *bona fide* understanding was wrong?



As this Court explained in *Corning Glass*, Congress did not intend in the Equal Pay Act to impose civil liability on an employer who, acting in good faith, premises a wage differential on his determination that two jobs are different, even if his conclusion is mistaken. Only differentials "based on sex" were to be forbidden, not differentials based on a *bona fide* determination that the jobs do not involve "equal work" requiring "equal skill, effort, and responsibility" under "similar working conditions." 29 U.S.C. §206(d)(1); *see Corning Glass Works v. Brennan, supra*, 417 U.S. at 199-204.

Reviewing the legislative history of the Equal Pay Act in *Corning Glass*, this Court noted that Congress rejected early versions of the bill that would have permitted "second-guessing the validity of a company's job evaluation system." 417 U.S. at 200. It is precisely this kind of "second-guessing" that underlies the decisions below. The district court, with the approval of the court of appeals, independently analyzed the "equality" of the jobs of purser and stewardess, despite the collective bargaining agreement. *See* Pet. App. 7c-16c, 33c-39c. That approach flatly conflicts with the requirements of the Act and the premise of this Court's decision in *Corning Glass*.

If wage differentials based upon a *bona fide* job evaluation plan developed unilaterally by the employer are outside the purview of the Act, as this Court held in *Corning Glass, supra*, 417 U.S. at 201, then *a fortiori* the distinctions in job specifications and wages incorporated in a formal union contract after good faith adversary bargaining must be immune from a later charge that the differentials are based on sex rather

than perceived differences between the jobs. *Cf. Trans World Airlines, Inc. v. Hardison*, 97 S. Ct. 2264, 2274-76 (1977), where the Court held that an employer's compliance with the job-assignment and seniority provisions of a *bona fide* collective bargaining agreement precluded a finding that the employer had discriminated against an employee on the basis of religion in violation of Title VII of the Civil Rights Act. As one of the sponsors of the Equal Pay Act explained: "[The Act] is not intended to compare unrelated jobs, or jobs that have been *historically and normally considered by the industry to be different.*" 109 Cong. Rec. 9196 (1963) (remarks of Rep. Frelinghuysen) (emphasis added).

The court below discounted the legal significance of the collective bargaining agreement here by observing that "union activity cannot strip individual employees of the opportunity to seek vindication of their statutory entitlements in court" (Pet. App. 25c). Just as in *Trans World Airlines, Inc. v. Hardison, supra*, 97 S. Ct. at 2274, this comment begs the question. Northwest does not claim that union complicity in illegal activity can "strip" employees of their statutory rights. Rather, our position is that the *bona fide* agreement between Northwest and the plaintiffs' union, establishing the positions of stewardess and purser as different jobs entitled to different pay, demonstrates that the pay differential was based on an understanding that the jobs were not equal and thus could not have been and was not "based on" sex.

In fulfilling its obligation of non-discriminatory representation of all its members, a union, by agreeing to a contract, confirms the *bona fides* of the



employer's job evaluations. That general principle applies with special force in this case where at all times the union was dominated by female stewardesses, the very class that now claims to be the victim of sex-based discrimination. There is no question in this case about the existence and *bona fides* of this understanding. The district court expressly found that Northwest:

> "did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise." 374 F. Supp. at 1390, Pet. App. 1b.[7]

Once Northwest made the showing that it believed the jobs were not equal and that it was complying with a collective bargaining agreement, it was the plaintiffs' burden to show that the collective bargaining agreement was a mere pretext to cover a discriminatory intent. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-807 (1973). Since there was no such showing here,[8] Northwest's understanding, whether or not

[7] The findings of fact supporting this conclusion were not challenged by the court of appeals.

[8] The respondent stewardesses did not allege, let alone present evidence, that their union had unfairly or discriminatorily represented them. Nor could they have, for as the district court found, the successor unions that represented all cabin attendants, including pursers, were "predominantly female, so that females always have and still do possess a clear numerical superiority over males in the affairs of the class or craft and the union representative." 366 F. Supp. at 765-66, Pet. App. 5a, ¶ 8.

There is simply no support for the speculation by the court of appeals that, in contract after contract, the respondents' union negotiators understood the purser and stewardess jobs as equal, but acquiesced in maintaining pay differentials "in order to achieve more pressing bargaining objectives" (Pet. App. 25c).

erroneous, establishes as a matter of law that the pay differentials were based on the inequality of the jobs and that Northwest did not "discriminate . . . on the basis of sex" within the meaning of the Equal Pay Act.

The core error in the approach of the courts below was the failure to insist on proof of an intent to discriminate on the basis of sex. As this Court has recently emphasized in considering Title VII, whose proscriptive language is virtually identical to that of the Equal Pay Act, adequate "proof of *discriminatory motive is critical*" where plaintiffs claim that they have been the victims of "discrimination" based on "disparate treatment." *International Brotherhood of Teamsters v. United States*, 97 S. Ct. 1843, 1854 n.15 (1977) (emphasis added). The very concept of "discrimination," whether constitutional or statutory, necessarily implies some notion of intent to distinguish on the prohibited "basis."[9]

Plaintiffs presented no evidence that the pay differential between the purser and stewardess positions had been established with discriminatory intent. Moreover, in the circumstances of this case, where male FSA's were paid at the same lower rate as stewardesses, discriminatory intent could not be inferred "from the mere fact of differences in treatment." *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); *cf. Hazelwood*

[9]*See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-66 (1977); *General Electric Co.* v. *Gilbert, supra*, 429 U.S. at 137; *cf. McDonnel Douglas Corp.* v. *Green, supra*, 411 U.S. at 804-806.



*School District v. United States*, 97 S. Ct. 2736, 2742-43 (1977).

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977), the Court held that a distinction between "pregnant women and non-pregnant persons" is not sex-based "discrimination" for purposes of Title VII. *See also Geduldig v. Aiello*, 417 U.S. 484 (1974). Similarly, in *United Airlines, Inc. v. Evans*, 97 S. Ct. 1885, 1888-89 (1977), the Court held that, where an airline treated both men and women alike in computing seniority and prior-service credit, even though other male employees obtained other advantages, the women could not establish that the differentials were "on the basis of sex" within the meaning of Title VII. So too, in the absence of proof of an actual intent to discriminate, Northwest's job distinction between (a) male pursers and (b) male and female cabin attendants cannot be *sex* discrimination under the Equal Pay Act. *Cf. Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1170 n.4 (3d Cir. 1977).

The court below erred in reading the notion of discriminatory intent out of the Equal Pay Act.[10] Both this general issue and the particular significance of *bona fide* collective bargaining agreements in suits under the

[10]The court of appeals also erred in holding summarily (Pet. App. 49c) that the pay differential between pursers and stewardesses violated Title VII as well as the Equal Pay Act. Under Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), a pay differential that is legal under the Equal Pay Act cannot constitute a violation of Title VII. *See General Electric Co. v. Gilbert, supra*, 429 U.S. at 143-44. If the pay differential here did not violate the Equal Pay Act, the holding below that the differential violated Title VII also must be reversed.

Equal Pay Act raise fundamental questions of general application to all employers and employees.[11]

## II

The Equal Pay Act prohibits sex-based employment discrimination in the form of unequal pay for "equal work on jobs the performance of which requires equal skill, effort, and responsibility. . . ." 29 U.S.C. § 206(d)(1). In concluding that pursers and stewardesses perform "equal work," the court of appeals discounted the significance of the added supervisory responsibility

[11]There is a related question about the effect of the collective bargaining agreement on the *extent* of the purser/stewardess differential that could be "based on sex." The job definition in the contract (*see* p. 7, *supra*) identifies a purser as an employee "on the international division," and virtually all pursers flew, in accordance with tradition, on international flights or transoceanic flights (or military charters). 366 F. Supp. at 776-78, Pet. App. 28a-31a, ¶ 41; Plaintiffs' Exh. 500, J.A. A-172. Under the collective bargaining contract, a stewardess similarly engaged in "foreign flying" received a $77 per month supplement.

The district court held that, in equalizing the pay and computing the stewardesses' backpay entitlement, stewardesses who had received the foreign flying supplements should have those amounts deducted from the differential, thus depriving them of the premium they earned over domestic stewardesses. *See* 374 F. Supp. at 1385-1386, Pet. App. 6b-9b, ¶¶ 5(a), 6(a), 7(a). But to the extent the contract established that the "foreign flying" component of the cabin attendants' job was worth about $77 per month, that figure should have been used to reduce the differential between pursers and *domestic* stewardesses.



possessed and exercised by pursers.[12] This holding raises a fundamental issue concerning the interpretation of the "equal responsibility" element of the Act's focus on "equal work."

Congress carefully chose the relatively narrow test of "equal work" rather than "comparable work" (a phrase which had appeared in earlier drafts of the Equal Pay Act) in order to ensure that "the jobs involved should be virtually identical. . . ." 109 Cong. Rec. 8866, 8913-17, 9192-9218, 9761-62 (1963); *see Angelo v. Bacharach Instrument Co., supra*, 555 F.2d at 1173-75; *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972). The holding by the court of appeals in this case improperly resurrects the concept of comparability.

Although much of the work performed by all cabin attendants on a flight is similar, pursers possess and exercise supervisory authority over other cabin attendants. 366 F. Supp. at 785-786, Pet. App. 48a, 50a-51a,

[12]The court below expressly applied the "clearly erroneous" standard in deciding that the supervisory duties of pursers required "no greater skill, effort or responsibility than the other functions assigned to all cabin attendants" (Pet. App. 38c). That approach conflicts with the decisions of other courts of appeals holding that the "equal work" issue is a mixed question of fact and law that requires independent examination by the reviewing court. *See Christopher v. Iowa*, 559 F.2d 1135, 1138 & n.13 (8th Cir. 1977); *Schultz v. American Can Co.*, 424 F.2d 356, 360 & n.6 (8th Cir. 1970); *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 267 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *cf. Stewart* v. *General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3853 (June 29, 1977). The ultimate statutory issue of job equality does not fall within the purview of Fed. R. Civ. P. 52(a). *See generally Baumgartner v. United States*, 322 U.S. 665, 670-672 (1944).

¶¶ 65-66, 69. The court of appeals disparaged this supervisory responsibility, relying on the following "finding" by the district court:

> "The 'supervisory' functions of Senior cabin attendants – whether purser or stewardess – are *less important than*, and require no greater skill, effort or responsibility, than *the other functions assigned to all cabin attendants*." Pet. App. 37c-38c (emphasis added) (footnotes omitted).

Although the court expressly acknowledged the existence of "increased responsibility borne by the more senior personnel," it concluded that the supervisory duties of pursers are not *significant enough* to warrant the pay differential between pursers and stewardesses (Pet. App. 39c). But, in light of the undeniable material difference between the specific functions and responsibilities of pursers and stewardesses (366 F. Supp. at 783-785, 786-787, Pet. App. 43a-48a, 51a-52a, ¶¶ 61-66, 71; Pet. App. 9c-16c), the courts below were not free to conclude that the jobs nevertheless were "equal" for purposes of the Equal Pay Act.

If some skills, labors, or responsibilities are different, it is of no consequence that the differences are, in the view of a court, "less important" than the similarities. It is not the function of the courts under the Act to engage in *de novo* reevaluation of the total skill, effort, and responsibility of distinct jobs to reach a judicially contrived common denominator. For jobs – or their components – to fall outside the "equal work" standard they need not necessarily be more or less "important" than each other. They need only be different. As the Third Circuit recently explained:



> "We find nothing in the case law or in the legislative history to support the proposition that the requirements of equal skill, effort, responsibility, and similar working conditions can be aggregated to establish job equality, so that, for example, differences in responsibility between two jobs can be offset by compensatory differences in the skill required so as to make the two jobs equal." *Angelo v. Bacharach Instrument Co., supra*, 555 F.2d at 1175-76.

Yet, that is precisely what the courts below did, and their approach is in square conflict with the principles followed by the Third Circuit in *Bacharach*. It was simply not legally material to conclude, as the courts below did, that the work performed by pursers and stewardesses was "essentially equal when considered as a whole" (Pet. App. 10c) and that separate tasks entailed "different, but comparable, duties" (Pet. App. 12c).

The critical point missed by the courts below is that pursers are, by definition, supervisors, and as such exercise the responsibility for supervising all flight attendants, including stewardesses, who never supervise pursers. As the Fifth Circuit put it:

> "Congress intended to permit employers wide discretion in evaluating work for pay purposes. . . . [A] wage differential can be justified for employees who are available to perform an important differentiating task even though they do not spend large amounts of time at the task." *Hodgson v. Golden Isles Convalescent Homes, Inc., supra*, 468 F.2d at 1258.

It is impossible to find under the Equal Pay Act that a person who holds a job that can be supervised by any person in another job has "responsibility" that is

"equal" to that latter person's. For example, both a first lieutenant and a master sergeant may share many common functions, but the authority of one to supervise the other surely precludes a finding that they exercise "equal responsibility." *See Cayce v. Adams, supra,* ____ F. Supp. ____, ____, slip op. at 2 ("full comparability was not achieved" until the female's supervisor resigned and the female assumed the supervisor's work). This crucial distinction separates pursers from stewardesses.[13]

The court's free-wheeling comparison of the jobs resulted in imposing on Northwest the fundamental

[13]The supervisory duties of a stewardess who happens to be senior on a particular flight not carrying a purser are not the same as those of pursers. The differences are explained in Northwest's cabin service manual. *See* Pet. App. 14c-15c.

Without citation of authority, the court of appeals held that Northwest could not pay pursers as a class more than stewardesses on the basis of their class-wide characteristic of supervisory responsibility because some pursers were assigned to flights on which they would be subject to supervision by more senior pursers and would not exercise supervisory authority over any stewardesses, while on a non-purser flight the senior stewardess would assume control. The court relied on the fact that Northwest possesses the technological capability to compensate cabin attendants for those specific occasions when they act as supervisors. (Pet. App. 34c-36c.)

Nothing in the language or legislative history of the Equal Pay Act remotely suggests that Congress intended that an employer may not pay one class of employees more than another unless the distinguishing attribute is always common to all members of the higher paid class or unless the employer could not set up a payroll system that constantly adjusted for the incremental changes in activities of individual employees. *Cf. Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir. 1977), where the court upheld a wage differential in a much simpler setting even though "the women were able to substitute for [the male employee] in terms of his individual assignments. . . ."



injustice and economic irrationality of an order to pay retroactively to some 2,000 stewardesses (whether or not they ever bore any supervisory responsibility) the higher wages paid to approximately 100 pursers who had actual supervisory authority.[14] If the court's mode of analysis were to be followed, it would broaden the Equal Pay Act far beyond what was intended and inevitably place the courts in the role of comparing the "total" combined skill, effort, and responsibility required by different jobs, rather than the limited role of determining whether each of the elements of a job is equal, including the element of responsibility.

## III

Backpay under the Fair Labor Standards Act, of which the Equal Pay Act is part, ordinarily may be recovered for only the two years preceding the date suit is filed. Congress provided, however, that in the case of a "willful" violation backpay may be recovered for *three* preceding years. 29 U.S.C. § 255(a).

The district court found that Northwest's management had believed in good faith that pursers and stewardesses held distinct positions having different

[14]*Cf. Cayce v. Adams, supra,* ____ F. Supp. ____, ____, slip op. at 5 n.3: "Legal arguments aside, it simply cannot be maintained that Congress intended to remedy every sex-based Civil Service misclassification by upgrading all those with the lower grade even when, as here, the classification standards indicate that the lower grade is the correct one. Such a practice would result in widespread grade inflation and thus threaten the integrity of the entire Civil Service system."

responsibilities and that there were "reasonable grounds" for the company's belief that the pay differential did not violate the Equal Pay Act. 374 F. Supp. at 1390, Pet. App. 1b-2b. The court of appeals did not disturb these findings, but nonetheless upheld the district court's conclusion that Northwest's decision to establish different pay scales constituted a "willful" violation. An employer's action may be deemed "willful," the court below held, whenever he is cognizant of the Equal Pay Act and "consciously and voluntarily charts a course which turns out to be wrong" (Pet. App. 59c). Under this standard not even negligence in the interpretation of the Act is necessary to expose an employer to the added sanctions reserved for a "willful" violation. Whether Congress intended this result is a question of overwhelming importance to all employers and employees governed by the Fair Labor Standards Act and one that this Court must resolve if the accepted distinction between "willful" violations and lesser infractions is to be preserved.

The two-year limitations period was enacted in 1947 when Congress expressed concern about "wholly unexpected liabilities, immense in amount and retroactive in operation." *See* 29 U.S.C. § 251(a). In 1966 Congress rejected a recommendation from the Secretary of Labor to extend the limitations period for all violations and instead adopted the present language which "maintains [the] 2-year statute of limitations" with an exception "in the case of a willful violation." H.R. Rep. No. 1366, 89th Cong., 2d Sess. 14 (1966). *See also* S. Rep. No. 1487, 89th Cong., 2d Sess. 36 (1966). The language and history of the Act thus belie



any notion that a finding of willfulness should follow routinely from a violation itself.

Moreover, in the Fair Labor Standards Act, as in other regulatory statutes, Congress attached special civil sanctions, as well as criminal sanctions, to "willful" violations. It is unthinkable that Congress intended to expose every employer whose judgment "turns out to be wrong" to criminal conviction, fine, and imprisonment. The court below concluded that the "willfulness" element could take on two quite different meanings even in the same statute, depending upon the penalty involved (Pet. App. 58c n.230). But that effort to divorce the interpretation of related provisions must be rejected where, as here, there is no evidence that Congress intended divergent standards and the sanctions form a pattern: civil liability for all violations, supplemented by both criminal sanctions and expanded civil liability for violations accompanied by *scienter*. In an analogous case, *United States* v. *Bishop*, 412 U.S. 346, 359-60 (1973), this Court rejected the kind of approach taken below and held that even though criminal penalties may vary in severity, the word "willful" describes a "constant rather than a variable" standard of conduct.

The very concept of "willfulness" necessarily requires proof of *scienter* beyond that sufficient for a non-willful violation carrying lesser consequences. This Court consistently has interpreted the term "willful," in a variety of regulatory statutes, to mean the "*intentional* violation of a *known* legal duty."[15] The

[15] *E.g.*, *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (emphasis added); *United States v. Bishop, supra*, 412 U.S. at 360.

requirement of intentional, knowing conduct cannot be satisfied by proof of negligence alone, for as this Court has pointed out, even "unreasonable, capricious, or careless disregard" will not suffice. *United States v. Bishop, supra*, 412 U.S. at 354, 360-61. It follows *a fortiori* that reasonable, good faith conduct that is merely "conscious and voluntary" is not enough.

For the court below, however, it was enough that the pay differential established by Northwest was "deliberate" (Pet. App. 61c). It is virtually impossible to imagine an employment practice that is not "deliberate," particularly one which, as in the present case, is the product of long-standing collective bargaining agreements. Ironically, under the decision below the employer who is most likely to be deemed in "willful" breach of the Act is the one whose belief in the lawfulness of his conduct is the most justifiable – that is, one whose belief has been ratified in the formal collective bargaining process by an adversary bound by law to represent all employees fairly. Congress has evinced a "pervasive intent" to use the requirement of "willfulness" to separate egregious violations involving *scienter* from a larger class of "well-meaning" transgressions. *See United States v. Bishop, supra*, 412 U.S. at 361. The decision below effectively lumps all violations together and prescribes the most severe penalty for all – an anomaly that Congress could never have intended.

As the court below expressly acknowledged (Pet. App. 51c), at least "two divergent views" have evolved among the circuits in "wrestling" with the interpretation of the "willful" element in this Act. By adopting a new test (Pet. App. 58c-59c), the court of appeals has compounded the confusion on this important issue. The



time is certainly ripe for this Court to resolve the conflict.[16]

## IV

An Equal Pay Act claimant, like others suing under the Fair Labor Standards Act, may recover not only backpay but "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The statute further provides, however, that the district court in its discretion may refuse to award double damages if the employer acted "in good faith" and if he had "reasonable grounds" for believing that his actions were lawful. 29 U.S.C. § 260.

The district court here ruled that double damages should not be imposed, articulating five factors that supported its finding that Northwest had reasonable grounds for its belief that the pay differential was lawful:

> "the traditional practice of the Company in treating the positions as unequal, the general industry practice to the same effect, the acquiescence of the stewardesses' bargaining representative in this arrangement, the absence of any grievances or even suggestions from stewardesses to the contrary prior to the present legal controversy, and the absence of any clear legal precedent or

[16]The size of the judgment in this case belies the statement by the court below that the answer to this question makes only a "relatively small difference" (Pet. App. 56c-57c). Liability is increased by up to 50% and, as in this case, millions of dollars may turn on whether an employer has acted "willfully."

guideline precisely in point." 374 F. Supp. at 1390, Pet. App. 1b-2b.

The court of appeals held that four of these five factors were irrelevant to the determination of reasonable, good faith belief (Pet. App. 66c-67c). It ruled that only "legal uncertainty" can afford a basis for relief from the double damages provision, and then only if the uncertainty "pervade[s] and markedly influence[s] the employer's belief" (Pet. App. 68c).

The four factors that the court below discarded are derived from the statute itself. In 1947 Congress gave statutory relief for "good faith" acts to remove the harshness of a liquidated damages provision that previously had been construed as mandatory. Congress found that without the amendment the Fair Labor Standards Act would result in "wholly unexpected liabilities, immense in amount and retroactive in operation" by unexpectedly overriding "long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a) (Congressional findings and declaration of policy). The amendments, including the "good faith" provision of § 260, were intended to avoid this result and to "protect the right of collective bargaining." 29 U.S.C. § 251(a)(6). Yet the decision below holds that (i) tradition and custom, (ii) industry practice, (iii) the collective bargaining agreement, and (iv) Northwest's experience under it – the very circumstances that Congress declared give presumptive legitimacy to employment practices – are irrelevant in applying the "good faith" provision of § 260.[17]

[17] The court below cited no authority for this unprecedented rejection of statutory criteria, and the only reason it gave was that "sex discrimination litigation against the airline industry" *(continued)*



By insisting that a "legal uncertainty" that "pervades" the employer's belief is the sole criterion, the decision below effectively makes it impossible for employers to avoid double damages, however reasonable their beliefs. Even when, as in this case, there is an "absence of any clear legal precedent or guideline precisely in point" (Pet. App. 63c), the employer's decision to continue the practice in question will be based on a combination of related factors – tradition, industry practice, and collective bargaining experience, *together with* the absence of legal authority addressing the practice in question – rather than on any one criterion alone. If an established employment practice has not been challenged either by individual employees or by their collective bargaining representative, the employer has little reason to suppose that there is any legal infirmity.[18]

An employer whose decision was reasonably based on several factors may well have difficulty proving years

*(footnote continued from preceding page)*
made it appropriate to discard the district court's criteria (Pet. App. 66c-67c). The litigation on which the court focused, however, was commenced *after* the occurence of the employment practices at issue in this litigation. Moreover, not one of the cases involved the job classifications and pay differentials challenged here.

[18] Other courts have held that if the employer's belief is otherwise reasonable, he is not deprived of the "good faith" protection merely because by making additional inquiry he might have been led to question his judgment that a practice was lawful. *See, e.g., Crago v. Rockwell Manufacturing Co.*, 301 F. Supp. 743, 748 (W.D. Pa. 1969) (employer acted in good faith even though an opinion from internal legal department or from Labor Department might have been sought); *Ispass v. Pyramid Motor Freight Corp.*, 78 F. Supp. 475, 480 (S.D.N.Y. 1948) (employer acted in good faith even though it had not taken affirmative steps to ascertain whether employees were exempt from coverage under Act).

afterward that only a single factor, legal uncertainty, "pervade[d] and markedly influence[d]" his belief. In making pervasive "legal uncertainty" the exclusive touchstone of the "good faith" defense, the decision by the court below reads all other pertinent factors out of the statute and subjects employers to double damages for judgments that were reasonable when made, but are later overturned in litigation – precisely the result Congress sought to prevent.

## V

While this action was pending before the district court, the remedial provisions of Title VII were amended to provide that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission." 42 U.S.C. § 2000e-5(g). In holding that the two-year limitation did not apply to this case (Pet. App. 71c-72c), the court of appeals ignored the settled principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[19] The court's holding also conflicts with this Court's decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and with the recently decided case,

[19] *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974); *see Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 (1969); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).



*Roberts v. Western Airlines*, 425 F. Supp. 416, 419-25 (N.D. Cal. 1976).

A successful Title VII claimant is not entitled to backpay as of right; backpay is only one of the discretionary, equitable remedies that courts may grant under Section 706(g). *See Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 415-16. Thus, application of the 1972 amendment to respondents' claim could not have deprived them of a vested right. It is settled law that changes in remedies are normally and properly applicable to pending disputes. It is not surprising, therefore, that this Court assumed in *Albemarle* that the backpay limitation applied there, even though that case, like this one, was pending in court when the amendment became effective. *See* 422 U.S. at 410 n.3.[20]

In concluding that the 1972 amendment does not apply to this case, the court of appeals relied on

[20] The district court, although concluding that the amendment was not strictly applicable to this case, limited the recovery period to two years in the exercise of its discretion, taking into account the "considerations" expressed by Congress. 374 F. Supp. at 1390, Pet. App. 2b-3b. Purporting to rely on *Albemarle*, the court of appeals reversed, asserting that the district court's approach was inconsistent with the "make whole" remedy provided by Title VII (Pet. App. 76c-80c). *Albemarle*, however, discusses the "make whole" remedy in the context of the 1972 amendments. *See* 422 U.S. at 415-16 & n.9, 419-20 & n.13. Thus, this Court evidently considered the statutory two-year limitation on back pay to be consistent with the "make whole" remedy, as Congress designed it.

Even if the 1972 amendment did not apply of its own force, the court of appeals certainly overreached in prohibiting the district court, in exercising its equitable discretion to define the appropriate backpay period, from applying the policy judgment the amendment reflected.

Section 14 of the 1972 legislation, which provides that the amendments to Section 706 of Title VII "shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." Pub. L. No. 92-261, 86 Stat. 103. Without any reference to the legislative history, the court concluded that the "irresistable inference from this language is that the amendments were not to extend to litigation which on their effective date had proceeded beyond the Commission stage" (Pet. App. 71c).[21]

Far from "irresistable," however, the inference drawn by the court defies common sense and disregards the history of Section 14. If Congress had been trying to draw lines restricting the application of the new limitations period, it would have chosen the date the unfair employment practice occurred, not the status of the claim in the administrative/judicial process.

The legislative history confirms that Section 14 was designed to deal with a *different* issue. Section 14 was enacted simply to make explicit that the EEOC's new judicial enforcement power would be effective *immediately* and would apply to the large backlog of cases then pending before the Commission.[22] Since Congress

[21] Other appellate decisions holding that the two-year limitation on backpay does not apply to actions pending in court are also devoid of substantive analysis. *See, e g., EEOC v. Steamfitters Local 638*, 542 F.2d 579, 590 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977).

[22] The 1972 amendments to Title VII, as initially reported out of committee in both Houses, would have granted the EEOC cease-and-desist power. This was the primary purpose of the amendments to Section 706, and the focal point of debate. The *(continued)*



was dealing solely with the retroactivity of the EEOC's new enforcement power, about which doubts had been raised, it is understandable why Section 14 refers to cases pending before the EEOC and makes no reference to cases that were already in court in private litigation – like the present case. There is no reference in the legislative history of Section 14 to the other amendments to Section 706, including the backpay limitation provision.

In this setting the court below had no basis to conclude that the peculiar language of Section 14, drafted to assure immediate effectiveness of one part of the amendments to Section 706, was intended to *preclude* the immediate application of the backpay limitation. This Court has firmly established the principle that "a change in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases." *Bradley v. School Board of Richmond, supra*, 416 U.S. at 712-13 (emphasis in the original). The contrary result reached by the court

*(footnote continued from preceding page)*
respective bills provided that the new cease-and-desist power would be prospective only and, thus, would not apply to charges filed with the EEOC prior to the effective date of the amendments. *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 9-10 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 20 (1971). In both the House and the Senate, however, the cease-and-desist power was supplanted with the power of the EEOC to institute enforcement actions in the district courts. The new House bill was silent as to retroactivity; the provision that eventually became Section 14 was added to the Senate bill by an amendment offered by Senator Javits. As he explained, the amendment had been suggested by the Department of Justice, which *favored* "retroactive" application of the authority to sue, so as to cover charges already at the EEOC. *See* 118 Cong. Rec. 4816 (1972).

below thus departs from settled principles and authorizes the imposition of substantial, additional liability of the type that Congress specifically sought to avoid.

## VI

Title VII permits actions to be brought only by persons who have filed a charge with the EEOC within a limited period after the challenged employment practice occurred. At the time this suit was filed that period was 90 days. Section 706(d), Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 259, *codified in* 42 U.S.C. § 2000e-5(d) (1970).[23] While a person who has met this filing requirement can sue on behalf of all persons subject to the alleged discriminatory practice, *see Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 414 n.8, the class can extend only to those who were in a position to seek relief from the EEOC at the time the class representative filed with the EEOC. As the court below recognized: "That filing . . . cannot revive claims which are no longer viable at the time of the filing" (Pet. App. 82c) (footnote omitted). Nevertheless, the court of appeals held that Northwest was "estopped" from arguing that the Title VII class could not include stewardesses whose employment had terminated more than 90 days before the filing of charges with the EEOC, because the phrasing of the Title VII notice to potential class members may have

[23]The 1972 amendments to Title VII extended this period to 180 days, but this change is not material to the legal question at issue. *See* 42 U.S.C. § 2000e-5(e) (Supp. II, 1972).



misled them into ignoring the Equal Pay Act notices they were also sent.[24] The applicability of "estoppel" concepts to Title VII's timeliness requirements presents an important issue, and its resolution below is squarely at odds with controlling decisions of this Court.

This Court has stated on a number of occasions that the EEOC filing requirement is a "jurisdictional prerequisite" to assertion of a civil claim in court.[25]

[24]The extraordinary lengths to which the court of appeals was willing to go to impose liability on Northwest is demonstrated by the unsupportable basis for its estoppel holding. Estoppel is an equitable doctrine that precludes a party from taking advantage of an act or omission that he has wrongfully induced by his own affirmative conduct. *See generally Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-34 (1959). According to the court of appeals, Northwest was estopped because it purportedly had not timely raised the 90-day bar and thus was responsible for the misleading class notices sent to stewardesses (Pet. App. 84c-85c, 89c-90c). The crucial fact – the fact that precludes a finding of estoppel here even if the filing requirement is not a jurisdictional bar – is that *counsel for the plaintiff stewardesses* drafted the proposed notices that formed the basis for the notices adopted by the district court (J.A. 61-62).

Furthermore, the legal status of those "class" notices to solicit Equal Pay Act plaintiffs is highly questionable since virtually every other circuit has ruled that a Rule 23 class action cannot be maintained under any portion of the Fair Labor Standards Act (of which the Equal Pay Act is part). *See, e.g., Schmidt v. Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975) (and cases cited); *Doctor v. Seaboard Coast Line Railroad*, 540 F.2d 699, 710 n.37 (4th Cir. 1976) (*dictum*). And there are "no procedures for the court to direct notice to the [EPA] class." *Maguire v. Trans World Airlines, Inc., supra*, 55 F.R.D. at 49.

[25]*See United Airlines, Inc. v. Evans, supra*, 97 S. Ct. at 1887 n.4; *Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 239-40 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 798.

Because it is jurisdictional, it cannot be waived by the parties, whether by agreement or through independent action that otherwise might constitute grounds for estoppel.[26] By reaching the question of estoppel, both courts below violated this fundamental principle of federal jurisdiction.

Choosing to ignore the repeated and unequivocal characterization of the filing requirement as jurisdictional, the court of appeals analogized it to a statute of limitations and held that it is subject to "equitable modification" (Pet. App. 86c-89c). The court relied on decisions of other courts of appeals that had held that the time provision is tolled by resort to a contractual grievance procedure (Pet. App. 87c & n.343). Subsequently, however, those decisions were decisively rejected by this Court last Term in *Electrical Workers Local 790 v. Robbins & Myers, Inc., supra.* In that case the Court squarely rejected an employee's argument that the 90-day filing requirement should be subject to "equitable tolling." The Court reasoned: "In defining Title VII's jurisdictional prerequisites 'with precision,' . . . Congress did not leave to courts the decision as to which delays might or might not be 'slight' " and, hence, which might or might not be "acceptable." 429 U.S. at 240 (citation omitted). Thus, even if this Court were not to grant plenary review on other issues presented, the decision below should be summarily reversed on this issue.[27]

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[26] *See, e.g., American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951); *Ahrens v. Clark,* 335 U.S. 188, 193 (1948); *United States v Griffin,* 303 U.S. 226, 229 (1938).

[27] A related issue was before the Court earlier this Term in *Shell Oil Co. v. Dartt*, No. 76-678 (Nov. 29, 1977), *aff'g by equally divided Court* 539 F.2d 1256 (10th Cir. 1976).



## CONCLUSION

This petition for a writ of certiorari should be granted and the case set for argument. Alternatively, in light of the facts that the decision below was rendered on October 20, 1976, and that this Court has decided a number of highly relevant cases[28] between that date and the court of appeals' denial of rehearing without opinion on September 8, 1977, the Court might wish to vacate the judgment below and remand the case for full reconsideration in light of the intervening decisions.[29]

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[28] As discussed above, these cases include *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976); *Trans World Airlines, Inc. v. Hardison,* 97 S. Ct. 2264 1977); *International Brotherhood of Teamsters v. United States,* 97 S. Ct. 1843 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Hazelwood School District v. United States,* 97 S. Ct. 2736 (1977); *United Airlines, Inc. v. Evans,* 97 S. Ct. 1885 (1977); *Electrical Workers Local 790 v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976).

In addition, there are three cases argued this Term whose disposition may bear upon the issues raised in Questions 1 and 6 of this Petition. *See Nashville Gas Co. v. Satty*, No. 75-536, argued Oct. 5, 1977; *United Air Lines, Inc. v. McMann,* No. 76-906, argued Oct. 4, 1977; *Richmond Unified School District v. Berg*, No. 75-1069, argued Oct. 5, 1977. *See also Shell Oil Co. v. Dartt*, No. 76-678 (Nov. 29, 1977), *aff'g by equally divided Court* 539 F.2d 1256 (10th Cir. 1976).

[29] *Compare Massachusetts v. Feeney,* 46 U.S.L.W. 3237 (October 11, 1977), vacating and remanding for further consideration in light of *Washington v. Davis,* 426 U.S. 229 (1976). Although the court of appeals in denying rehearing in this case asserted that it was cognizant of intervening decisions of this Court (Pet. App. 1f-2f), proper consideration of the seven decisions could only be based on full briefing in light of the record and an analytical discussion by the court of appeals of their impact.

Respectfully submitted.

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## STATUTORY APPENDIX

*Equal Pay Act of 1963 –*

29 U.S.C. § 206(d) (1970), as added to the Fair Labor Standards Act by Pub. L. No. 88-38, § 3, 77 Stat. 56:

> (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
>
> * * * *
>
> (3) For purposes of administration and enforcement, any amounts owing to an employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.
>
> * * * *

*Fair Labor Standards Act –*

Section 16(b), 29 U.S.C. § 216(b) (1970):

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. * * *

29 U.S.C. § 251(a) (1970), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 1, 61 Stat. 84:

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were



permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and

(10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

* * * *

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

* * * *

29 U.S.C. § 255(a) (1970), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 6, 61 Stat. 87, as amended by Pub. L. No. 89-601, § 601(b), 80 Stat. 844 (1966):

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act–
>
> (a) if the cause of action accrues on or after May 14, 1947–may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

* * * *



29 U.S.C. § 260 (1970), as added to the Fair Labor Standards Act by the Portal to Portal Act of 1947, Pub. L. No. 80-49, § 11, 61 Stat. 89:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

*Title VII of the Civil Rights Act of 1964 –*

Section 703, 42 U.S.C. § 2000e-2 (1970):

(a) It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * * *

Section 706(d), 42 U.S.C. § 2000e-5(d) (1970):

(d) A charge under subsection (a) shall be filed *within ninety days* after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or



local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.*

Section 706(g), 42 U.S.C. § 2000e-5(g) (Supp. II, 1972):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was

*The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104, amended the italicized language to permit charges to be filed within 180 days instead of 90 days. The provision is now codified at 42 U.S.C. § 2000e-5(e) (Supp. II, 1972).

refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.*

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*The italicized language was added by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104.